

BENEJAM



Comptroller General  
of the United States

408236

Washington, D.C. 20548

## Decision

**Matter of:** United Media Corporation

**File:** B-259425.2

**Date:** June 22, 1995

David B. Dempsey, Esq., and Sheila C. Stark, Esq., Akin, Gump, Strauss, Hauer & Feld, for the protester. Gregory H. Petkoff, Esq., and Janice C. Beckett, Esq., Department of the Air Force, for the agency. Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest challenging agency decision to retain audio-visual services in-house, rather than contracting for the services, is denied where agency's decision was reasonably based on the results of a cost comparison conducted pursuant to Office of Management and Budget Circular No. A-76.

2. Allegation that, in its cost comparison conducted pursuant to Office of Management and Budget Circular No. A-76, agency failed to properly consider the costs of converting to in-house performance work previously acquired under contract is denied where the record shows that the agency properly included a 10-percent "cost differential" to account for costs of the conversion in its calculations in accordance with the procedures established by the Circular.

### DECISION

United Media Corporation protests the decision by the Department of the Air Force, under invitation for bids (IFB) No. F33601-94-B-0018, to retain performance of visual information services in-house at Wright-Patterson Air Force Base, Ohio. After conducting a cost comparison pursuant to Office of Management and Budget (OMB) Circular No. A-76, the Air Force concluded that it would be more advantageous for the government not to contract for the services and canceled the solicitation. The protester contends that the agency's cost comparison is flawed.

We deny the protest.

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## BACKGROUND

The agency issued the performance work statement (PWS) on June 17, 1994, as part of a two-step solicitation<sup>1</sup> to provide the Air Force with a cost comparison to determine whether it would be more economical to perform the services in-house or by contract. Of the 42 firms issued the PWS, three firms, including United Media, submitted technical proposals. After evaluating proposals and holding discussions, the agency determined that United Media and another firm had submitted technically acceptable proposals and issued the IFB to those two firms.

Bidders were required to submit fixed prices to perform the work described in the PWS for a base period and for each of four 1-year option periods, and a grand total price for all performance periods. Based on a comparison of the grand totals, United Media submitted the apparent low bid (\$9,449,149), while the government's estimate of retaining the services in-house (\$9,478,149) was slightly higher.

Subsequently, the Air Force discovered that it had made a mistake in preparing its estimate. The Air Force states that it had included the costs of three maintenance contracts for government-furnished equipment (GFE) listed in the PWS. These costs would be borne by the Air Force regardless of the outcome of the A-76 cost comparison, and, thus, were considered "common costs." The agency explains that these common costs should not have been included in either the government's estimate or in the bidders' prices. The Air Force corrected its error by deducting the total costs of the three maintenance contracts (\$233,626) from its estimate (\$9,478,149 - \$233,626 = \$9,244,523), thereby displacing United Media as the apparent low bidder.

By letter dated November 9, the Air Force informed United Media that based on the results of the cost comparison, the services would be retained in-house. United Media subsequently filed an administrative appeal of the agency's cost comparison pursuant to Air Force Pamphlet (AFP) No. 26-12, Guidelines for Implementing the Air Force Commercial Activities Program, (Sept. 25, 1992), and OMB

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<sup>1</sup>A two-step procurement combines aspects of negotiated and sealed bidding procedures. During step one, the agency requests and evaluates technical proposals (and holds discussions if necessary) to determine the technical acceptability of proposals. No pricing is involved during step one. At step two, offerors that submitted technically acceptable proposals during step one submit sealed bids. Award is to be made in accordance with Federal Acquisition Regulation (FAR) subparts 14.3 and 14.4. See FAR § 14.501.

Circular No. A-76.<sup>2</sup> While the Air Force acknowledged the validity of some of the protester's complaints and made further revisions to the government's estimate and to United Media's price, the adjustments were insufficient to justify awarding a contract to United Media. In the final analysis, the Air Force recomputed the government's estimate as \$8,743,419,<sup>3</sup> and United Media's as \$8,827,346. On February 21, 1995, the agency denied United Media's appeal, and canceled the solicitation. This protest to our Office followed.

#### PROTESTER'S CONTENTIONS

United Media argues that the Air Force's decision to cancel the solicitation and retain the services in-house is unreasonable because the agency's cost comparison was flawed. The protester contends that the agency improperly deducted from the government's price the cost of the three "common costs" contracts because those contracts were not identified in the PWS. The protester also maintains that the Air Force miscalculated the costs of converting to in-house work previously performed by contract.

#### DISCUSSION

OMB Circular No. A-76 describes the executive branch's policy on the operation of commercial activities that are incidental to the performance of government functions. It outlines procedures for determining whether commercial activities should be operated under contract by private enterprise or in-house using government facilities and personnel. Generally, such decisions are matters of executive branch policy that our Office declines to review. However, we will review A-76 decisions growing out of an agency's issuance of a competitive solicitation for the purpose of comparing the cost of private and governmental operation of the commercial activity to determine whether

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<sup>2</sup>While that appeal was pending, on November 18, United Media filed a protest in our Office challenging the agency's decision not to contract for the services. Since the Air Force had not completed its review of United Media's appeal, we dismissed the protest as premature because the protester had not exhausted the agency's administrative appeal procedures. See Intelcom Support Servs., Inc., B-234488, Feb. 17, 1989, 89-1 CPD ¶ 174.

<sup>3</sup>The government's estimate of the cost of performing the services in-house reflects a recalculation of the cost differential provided for in the supplement to OMB Circular No. A-76 and in AFP No. 26-12, and potential income tax revenue derived from existing contracts.

the comparison was faulty or misleading. See Raytheon Support Servs. Co., B-228032.2, Dec. 30, 1987, 87-2 CPD ¶ 641.

We review agency decisions to retain services in-house instead of contracting for them solely to ascertain whether the agency followed the announced "ground rules" for the cost comparison. Ameriko Maint. Co., B-243728, Aug. 23, 1991, 91-2 CPD ¶ 191. We will recommend corrective action only where the record shows both that the agency did not follow the announced procedures and that this failure could have materially affected the outcome of the cost comparison. Id. Here, we find that United Media's contentions that the agency's cost comparison was flawed are without merit.

We first address United Media's argument that the government improperly deducted from its estimate common costs associated with the maintenance contracts. The PWS assigned the contractor the responsibility for providing the necessary personnel, equipment, tools, and materials to perform the contract. The PWS also detailed those services and government furnished equipment (GFE) for which the government--not the contractor--would be responsible. With respect to GFE, paragraph 5.8.5 of the PWS stated as follows:

"5.8.5. Government Furnished Equipment Maintenance Contracts. The contractor is not responsible for payment of the government furnished [e]quipment [m]aintenance [c]ontracts listed in [t]echnical [e]xhibit 5h nor the equipment historically repaired by commercial sources. The contractor shall provide to the [base visual information manager] the information needed to prepare requests for equipment maintenance and/or repair from commercial sources. . . ."

This provision clearly conveyed to bidders that the Air Force would continue to pay for the costs of the maintenance contracts for GFE, and that offerors were not expected to include those costs in their bids.<sup>4</sup>

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<sup>4</sup>Bidders were reminded throughout the PWS of the agency's intent to continue to pay for the existing maintenance contracts, and the protester does not argue that the PWS was unclear in this regard. In fact, United Media stated in its technical proposal, under a section entitled "Government Furnished Equipment Maintenance," that "[United Media] will maintain records that GFE was satisfactorily maintained and serviced through existing contracts," evidencing the firm's understanding of the Air Force's intent in this regard.

Technical exhibit 5h listed individually all GFE covered by the maintenance contracts.

The record shows that as of bid opening, the Air Force had in place five contracts with different firms in support of the audio-visual services. Three of those contracts were for maintaining the GFE listed in technical exhibit 5h. The other two contracts were for support services such as photo laboratory services (e.g., film processing, duplication, editing, and printing) and video services. Since sections 5.4.4.1 through 5.4.4.5 of the PWS specified that the contractor would be responsible for providing those support services, the government included the costs of the two service support contracts in its estimate. Contrary to the protester's assertions, none of the subsequent adjustments to the government's estimate affected those figures.

On the other hand, paragraph 5.8.5 of the PWS, quoted above, stated that the contractor would not be responsible for the costs of maintaining the GFE listed in technical exhibit 5h. Therefore, neither bidders nor the government should have included these common costs in their prices for cost comparison purposes. The record contains copies of the worksheets showing that the government included in its estimate the costs of the three maintenance contracts--i.e., common costs totaling \$233,626--in its initial estimate.<sup>5</sup>

In an A-76 cost comparison, bidders and the government should compete on the basis of the same scope of work. See DynCorp, B-233727.2, June 9, 1989, 89-1 CPD ¶ 543; EC Servs. Co., B-218202, May 23, 1985, 85-1 CPD ¶ 594. An agency should adjust its in-house cost estimate if it was not based on the scope of work specified in the solicitation. Satellite Servs., Inc., B-207180, Nov. 24, 1982, 82-2 CPD ¶ 474. Since the PWS here stated that the

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<sup>5</sup>In further support of its calculations, the agency provided our Office with copies of the three maintenance contracts at issue. Our review of these documents reveals that except for an immaterial difference due to rounding, the costs calculated by the government accurately reflect contract prices. The total amount deducted from the government's estimate equals the costs of the three maintenance contracts, calculated at an inflated/prorated cost over the five performance periods contemplated by the IFB. Although the protester points out that one of the three maintenance contracts the government used in its calculations expired, since the annual cost to the Air Force to replace that contract is greater than the expired contract, it appears that the common costs in question would actually be higher than calculated by the agency.

contractor would not be responsible for GFE maintenance, by including the costs of the maintenance contracts in its estimate, the government's cost comparison was not based on the scope of work specified in the solicitation. Accordingly, the government properly deducted the common costs from its estimate.<sup>6</sup>

The protester's argument that the agency's action was unreasonable because the maintenance contracts were not identified in the PWS lacks merit. For all GFE covered by the maintenance contracts, technical exhibit 5h, entitled "EAID EQUIPMENT ON MAINTENANCE CONTRACTS PAID BY THE GOVERNMENT," listed the category (e.g., VCRs, cameras, monitors, projectors, etc.), brand name, model, quantity, and stock number of each piece of GFE covered by the maintenance contracts that would continue to be paid for by the Air Force, regardless of the outcome of the competition. Since under the terms of the PWS the Air Force will continue to maintain all GFE listed in the technical exhibit at no cost to the contractor, the Air Force was not required to list the maintenance contracts in the PWS.<sup>7</sup>

United Media also argues that the government improperly failed to include in its estimate certain costs of converting to in-house performance work previously obtained under contract. Specifically, United Media argues that the government should have included in its estimate one-time conversion costs totaling \$83,824.03, reflecting the cost of

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<sup>6</sup>In footnote No. 7 of its protest to our Office, United Media argues that it should be allowed to deduct a similar amount from its bid because it also "mistakenly" included GFE maintenance costs in its bid. The protester does not point to any evidence in the record in support of its assertion that its bid contains a mistake. In any case, since United Media did not specifically raise this argument in its agency-level appeals of the cost comparison, we will not consider this further. See Professional Servs. Unified, Inc., B-257360.2, July 21, 1994, 94-2 CPD ¶ 39.

<sup>7</sup>To the extent that the protester argues that the PWS should have included the dollar value of the maintenance contracts, or their terms and conditions, this is an untimely objection to an impropriety apparent on the face of the PWS, which should have been raised either with the agency or our Office prior to the time set for receipt of initial technical proposals. See 4 C.F.R. § 21.2(a)(1) (1995).

the work of three photographers that was previously obtained under contract.<sup>8</sup> This allegation is without merit.

The agency explains that the costs associated with the three photographers at issue are not "one-time" costs, but rather reflect the costs of expanding an in-house activity to include the work performed by the three photographers which is currently acquired by contract. As such, OMB Circular No. A-76 and AFP No. 26-12 require that these type of personnel costs be treated, not as "one-time" conversion costs,<sup>9</sup> but as a "conversion differential," in accordance with procedures established in the supplement to OMB Circular No. A-76, entitled "Cost Comparison Handbook."

OMB Circular No. A-76 establishes a cost margin that must be exceeded before an agency may approve converting from contract to in-house performance. That margin is equal to 10 percent of the government's personnel-related cost and 25 percent of the acquisition cost of new capital assets (i.e., assets not currently owned by the government and used exclusively by the in-house operation). See OMB Circular No. A-76, supplement, part IV, chapter 5, paragraph E.<sup>10</sup>

The supplement sets forth in detail how the cost differential is to be calculated and factored into the government's estimate of performing the work in-house. Specifically, part IV, chapter 5, paragraph E.4 of the supplement states:

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<sup>8</sup>The agency states that the work performed by the three photographers at issue is currently being acquired under contract, while the remaining work described in the PWS is being performed in-house. As explained in greater detail below, the agency's calculations for cost comparison purposes take into account expanding the work currently performed in-house to include the work performed by the three photographers.

<sup>9</sup>Examples of one-time costs include office and plant rearrangements, employee recruitment, training, relocation expenses, and "one-time" expenses which are a direct result of discontinuing an existing contract or expanding the in-house operation. See OMB Circular No. A-76, supplement, part IV, ch. 5, paragraph D.2.

<sup>10</sup>The 25-percent margin relative to new capital assets recognizes the risks inherent in investing in capital assets. The agency states that since no capital investment is involved in this case, it was not necessary to calculate the 25-percent margin.

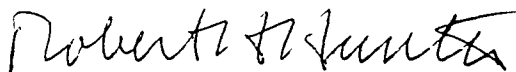
"4. Before approving an expansion of an in-house activity on a cost basis, the following cost differentials will be applied: the total of 10 percent of the personnel-related costs of the expansion plus 25 percent of the acquisition cost of the new capital assets required by the proposed expansion . . . , minus 10 percent of the personnel-related cost of the present activity."

The record shows that the Air Force used a software package to calculate the cost differential and to compute the cost comparison. Our in-depth review of the record reveals that in calculating the cost differential, the software program essentially combines the various steps prescribed in the supplement into a single formula, and generates a completed form with the resulting calculations.

In light of the protester's allegations--that the agency did not properly consider the costs associated with the three photographers in its cost comparison--we have followed the step-by-step instructions in the supplement quoted above to manually calculate the cost differential. By using the prescribed approach, we reached the same result as did the agency. The record thus shows that the agency followed the procedures established by the supplement in developing the cost differential, and the protester has not shown that the agency's approach was unreasonable.

Since we find that the agency reasonably concluded based on the results of the cost comparison that it would be more advantageous to the government to perform the required services in-house, we have no basis to object to the cancellation of the solicitation. See Carrier Corp., B-214331, Aug. 20, 1984, 84-2 CPD ¶ 197.

The protest is denied.

  
for Robert P. Murphy  
General Counsel